UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLLEGESOURCE, INC., a California corporation, Plaintiff, v. ACADEMYONE, INC., a Pennsylvania corporation, and DAVID K. MOLDOFF, an individual, Defendants.	:	Civil Action: 10-cv-3542-MAM

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR JUDGMENT AS TO CERTAIN AFFIRMATIVE DEFENSES

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Plaintiff CollegeSource, Inc. ("CollegeSource") respectfully submits the following Memorandum of Points and Authorities in support of its motion for summary judgment or judgment as to the Second, Fourth, Sixth, Eighth, Ninth and Tenth Affirmative Defenses asserted in defendant's Answer [Docket No.73] (the "Answer"), pursuant to Fed. Rul. Civ. Proc. 12(c), 12(f), and 56.

I. INTRODUCTION

Summary judgment or judgment should be granted as to defendant's Second, Fourth, Sixth, Eighth, Ninth and Tenth Affirmative Defenses affirmative defenses asserted in defendant's Answer.

As an initial matter, defendant notified plaintiff in writing that it was withdrawing the Second, Fourth, Sixth, Eighth, Ninth and Tenth Affirmative Defenses affirmative defenses asserted in defendant's Answer. Except for the Fourth Affirmative Defense of statute of limitations, defendant would not agree to file a formal stipulation withdrawing those affirmative defenses. This motion for summary judgment or judgment will make a clear record that those affirmative defenses are out of this case, and thus irrelevant.

Additionally, summary judgment or judgment as to the Second, Fourth, Sixth, Eighth, Ninth and Tenth Affirmative Defenses affirmative defenses asserted in defendant's Answer is proper so that the affirmative defenses in this action and the first-filed California Action are identical. Unless summary judgment or judgment is granted, the Answer in this action will assert affirmative defenses not asserted in the Answer in the first-filed California Action.

The Court should be aware that there are currently two related appeals pending in the Ninth Circuit from the orders in the California Action denying plaintiff's motion for a preliminary injunction to enjoin this action and granting a stay of the California Action. Plaintiff's consolidated opening appeal brief has been filed, along with briefing regarding the Ninth Circuit's jurisdiction to hear the appeals. The district court in the California Action and the Ninth Circuit denied a request to enjoin this Pennsylvania Action pending the outcome of the appeal. Nonetheless, this Court should not make any rulings that would potentially impact or moot the Ninth Circuit appeals.

II. LEGAL STANDARD

A court may grant summary judgment or judgment regarding any affirmative defense or part thereof in defendant's Answer [Docket No 73] . Rule 56(a) provides, in part:

> A party may move for summary judgment, identifying each claim or ***defense*** - or the ***part of each*** claim or ***defense***--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

(Emphasis added). Rule 12(c) provides: "After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings."

Under Fed. Rul. Civ. Proc. 12(f), the Court may strike "any insufficient defense" from a pleading. Rule 12(f)(1) allows a court to strike a defense "on its own." In the instant case, the court previously denied plaintiff's prior motion (Docket No. 81) without prejudice and ruled that "plaintiff may raise these arguments at a later date." [Docket No. 84]

"The function of a 12(f) motion to strike is to avoid expenditure of time and money that necessarily arises from litigating spurious issues by disposing of those issues prior to trial." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993) cert. denied 113 S. Ct. 2992 (1993); see also Delaware Health Care v. MCD Holding Co., 893 F. Supp. 1279, 1291 (D. Del. 1995) (citing Fogerty). "Striking legally insufficient defenses saves time and expense by making it unnecessary to litigate defenses that will not affect the outcome of the case." In re Merck & Co., 2010 U.S. Dist. LEXIS 62529 at *5 (D.N.J. 2010).

While motions to strike allegations in a complaint or counterclaim "usually will be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues," the expense and burden of litigating immaterial defenses may be sufficient prejudice to justify granting a motion to strike. New Jersey v. RRI Energy Mid-Atlantic Power, 2010 U.S. Dist. LEXIS 105866 at *22-*23 (E.D. Pa. 2010) citing McInerney v. Moyer Lumber and Hardware, Inc., 244 F.Supp.2d 393, 402 (E.D.Pa. 2002) (the extent to which litigating challenged material would cause "excessive delay, expense, or encroachment" is relevant to whether it should be stricken) and F.D.I.C. v. Modular Homes, Inc., 859 F.Supp. 117, 120 (D.N.J. 1994) (motion to strike "may serve to hasten resolution of cases by eliminating the need for discovery, which in turn saves time and litigation expenses"); See EEOC v. United Galaxy, Inc., 2011 U.S. Dist. LEXIS 28098 (D.N.J. 2011) at *4 ("Courts recognize that a motion to strike can save time and litigation expense by eliminating the need for discovery with regard to legally insufficient defenses"). Furthermore, "[a] plaintiff may demonstrate prejudice if the answer unclearly articulates to which claims the affirmative defenses apply." Francisco v. Verizon South Inc., 2010 U.S. Dist. LEXIS 77083 at *14-*15 (E.D. Va. 2010).

A court may strike conclusory defenses and unrecognized defenses. See Fesnak & Assocs., LLP v. U.S. Bank Nat'l Ass'n, 722 F. Supp. 2d 496, 502 (D. Del. 2010) (court may properly reject "conclusory allegations"); See Merck, 2010 U.S. Dist. LEXIS 62529 at *4

("An affirmative defense is insufficient if it is not a recognized defense to the cause of action").

A "mere denial as to the sufficiency of [the] claims is not an affirmative defense" and may be stricken. Merck, 2010 U.S. Dist. LEXIS 62529 at *8; See EEOC v. United Galaxy, Inc., 2011 U.S. Dist. LEXIS 28098 at *9-*10 (D.N.J. 2011) (same).

Also, due to the "short and plain statement rule" of pleading, an affirmative defense was to be stricken when it "omits a short and plain statement of facts entirely and fails totally to allege the necessary elements of the claim." Dann, 2011 U.S. Dist. LEXIS 13089 at *18 (E.D. Pa. 2011) at *18 citing Heller v. Midwhey Powder Co., 883 F.2d 1286, 1294-1295 (7th Cir. 1989)

III. SUMMARY JUDGMENT IS PROPER AS TO CERTAIN AFFIRMATIVE DEFENSES

A. AcademyOne Informally Withdrew Its Second, Fourth, Sixth, Eighth, Ninth and Tenth Affirmative Defenses

On October 10, 2011, defendant's counsel sent a letter informally notifying plaintiff that it was withdrawing certain affirmative defenses. Defendant's letter states, in part:

> ***I write to inform you that AcadcmyOne withdraws its Second, Sixth, Eighth, Ninth, and Tenth Affirmative Defenses in its Answer to the Amended Complaint***, without waiver of AcademyOne's ability to contest CollegcSource's failure to satisfy its burden to prove its claims. ***AcadcmyOne also withdraws its Fourth Affirmative Defense as a defense to all claims in the Amended Complaint except Count III (violation of the Computer Fraud and Abuse Act)***. AcademyOne reserves the right to assert these defenses in the action captioned *CollegeSource, Inc. v. AcademyOne. Inc.,* Case No. 3:08-cv-OI987-H-CAB (S.D. Cal.) (the "California Action"), or any other litigation between the parties.

Quinn Decl., Ex. A (Emphasis added).

In an email dated February 22, 2012, defendant agreed to formally withdraw its Fourth Affirmative Defense of statute of limitations in this Pennsylvania Action, but declined to do so with respect to its Second, Sixth, Eighth, Ninth, and Tenth Affirmative Defense. Defendant's email states:

> Again, you raise an issue already addressed on multiple occasions and ignore the express statement in our letter that the withdrawal of certain affirmative defenses was made without waiver of AcademyOne's right to contest CollegeSource's proof of its claims. The withdrawal of affirmative defenses 6, 8, 9 and 10 was nothing more than a clarification that we do not have the burden of proof on the issues raised by those affirmative defenses. Rather, CollegeSource bears the burden to prove its claims, which AcademyOne has denied and will vigorously contest at trial, assuming the claims survive summary judgment. ***We will note in our motion for summary judgment that these affirmative defenses are withdrawn. Neither will we be pursuing a statute of limitations defense in this case, which is a "true" affirmative defense. That being the case, we are willing to sign a stipulation concerning the statute of limitations.***

Quinn Decl., Ex. B (Emphasis added).

As a result, summary judgment should be granted to plaintiff against defendant as to the Second, Fourth, Sixth, Eighth, Ninth and Tenth Affirmative Defenses. These affirmative defenses provide, in full:

> **Second Affirmative Defense**
>
> CollegeSource's claims are barred, in whole or in part, because CollegeSource has not suffered any damages or injury.
>
> **Fourth Affirmative Defense**
>
> CollegeSource's claims are barred by the applicable statutes of limitations.
>
> **Sixth Affirmative Defense**
>
> CollegeSource's claims are barred because all of AcademyOne's conduct alleged in the First Amended Complaint was undertaken for legitimate business purposes and without unlawful purpose or motive. AcademyOne did not, at any time, act in bad faith.

Eighth Affirmative Defense

CollegeSource's claims are barred, in whole or in part, by CollegeSource's bad faith conduct.

Tenth Affirmative Defense

Counts III, IV, and V of the First Amended Complaint are barred by CollegeSource's failure to exercise diligence to protect and police the intellectual property that it claims a right to control.

Answer, 45-46.

B. Defendant's Answers In The First-Filed California Action And This Pennsylvania Action Should Assert Identical Affirmative Defenses

Defendant's Answer filed June 1, 2011 in this Pennsylvania Action lists ten affirmative defenses. Quinn Decl., Ex. C.

Defendant's Answer filed November 4, 2011 in the California Action lists four affirmative defenses. Quinn Decl., Ex. D.

Summary judgment as to the Second, Fourth, Sixth, Eighth, Ninth and Tenth Affirmative Defenses in defendant's Answer in this Pennsylvania Action will result in identical affirmative defenses being asserted in both actions.

The Court should be aware that there are currently two related appeals pending in the Ninth Circuit from the orders in the California Action denying plaintiff's motion for a preliminary injunction to enjoin this action and granting a stay of the California Action. Plaintiff's consolidated opening appeal brief has been filed. Additionally, the parties have fully briefed the issue whether the Ninth Circuit has jurisdiction to hear the appeals. The district court in the California Action and the Ninth Circuit denied a request to enjoin this Pennsylvania Action pending the outcome of the appeal. The docket sheets for both Ninth Circuit appeals are attached as Exhibits E and F to the concurrently filed Quinn Decl.

This Court should not make any rulings that would potentially impact or moot the Ninth Circuit appeals. Our Supreme Court has indicated that an appeal should be dismissed if it has become moot.

> It has long been settled that a federal court has no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills* v. *Green*, 159 U.S. 651, 653, 40 L. Ed. 293, 16 S. Ct. 132 (1895).See also *Preiser* v. *Newkirk*, 422 U.S. 395, 401, 45 L. Ed. 2d 272, 95 S. Ct. 2330 (1975); *North Carolina* v. *Rice*, 404 U.S. 244, 246, 30 L. Ed. 2d 413, 92 S. Ct. 402 (1971). For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant "any effectual relief whatever" to a prevailing party, the appeal must be dismissed. *Mills*, 159 U.S. at 653.

Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992).

C. Summary Judgment Or Judgment Is Appropriate As A Matter of Law

No legal authority supports the Second, Sixth, Eighth, Ninth and Tenth Affirmative Defenses. A court may strike conclusory defenses and unrecognized defenses. See Fesnak & Assocs., LLP v. U.S. Bank Nat'l Ass'n, 722 F. Supp. 2d 496, 502 (D. Del. 2010) (court may properly reject “conclusory allegations”); See Merck, 2010 U.S. Dist. LEXIS 62529 at *4 (“An affirmative defense is insufficient if it is not a recognized defense to the cause of action”).

IV. CONCLUSION

Based upon the foregoing, CollegeSource respectfully requests the Court grant summary judgment or judgment in favor of plaintiff and against defendant as to the Second, Fourth, Sixth, Eighth, Ninth and Tenth Affirmative Defenses affirmative defenses asserted in defendant’s Answer [Docket No.73]

Dated: February 27, 2012

Respectfully Submitted,

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